IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4349 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SOMABHAI BHAGWANBHAI MACHHI

Versus

STATE OF GUJARAT

Appearance:

MR AR SHAIKH for the Petitioner.

Ms.Archana Raval, Assistant GOVERNMENT PLEADER, for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 16/08/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 19.2.2004, by

which he is detained as a 'bootlegger' under the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). Along with the detention order, the petitioner-detenu is also served with the grounds of detention.

In the grounds of detention, there is a reference about one criminal case. The said case is registered under the Bombay Prohibition Act.

The authority, after considering the said case, has detained the petitioner under PASA. The authority has not recorded statements of any of the witnesses.

It is the aforesaid order which is impugned in this petition.

The learned Advocate for the petitioner submitted that this is a solitary incident and, therefore, it cannot be said that the petitioner is a habitual offender or that he has disturbed public order. He also further submitted that since this is the solitary incident, the petitioner should not have been detained under PASA.

To support the above plea, the learned Advocate for the petitioner has relied upon the decision of this Court in Sandip Omprakash Gupta v. State of Gujarat and others, 2004(1) GLR 864, wherein a solitary offence under the Bombay Prohibition ACt was registered against the detenu and the authority relied on two other unregistered offences based on statements of certain witnesses and, therefore, a learned single Judge of this Court held, on facts, that the detenu could have been dealt with under the ordinary criminal law. The order of detention passed therein, treating the petitioner as a bootlegger, is set aside. In view of the aforesaid ground about solitary incident of a registered case under the Bombay Prohibition Act, only on the basis of the aforesaid submission about solitary case lodged against the petitioner, which can be taken care of under the ordinary criminal law, this petition is required to be allowed.

The learned Advocate for the petitioner further submitted that there is delay of about two months in passing the detention order from the solitry registered case. It is required to be noted that there is only a solitary case. Neither were the statements of witnesses recorded nor is any material coming forward to reach the conclusion that the petitioner has violated public order.

The learned Advocate for the petitioner submitted

that the only material, based on which the detention order is passed, is the solitary registered criminal case and that by itself cannot be said to be a material for the purpose of holding that the petitioner's activities had become a threat to the public order and public health. He submitted that necessary material in this regard is totally wanting in the body of the detention order itself. He further submitted that in large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health.

In order to substantiate the above say, the learned Advocate for the petitioner has relied upon the Division Bench decision of this Court rendered in L.P.A. No.223 of 2000, wherein this Court held as under in paragraph 5 :

> "5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and

bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat

> to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

The averments made in the petition are not denied by filing any affidavit-in-reply and, therefore, the said averments are required to be taken as true in view of the fact that they remain uncontroverted.

For the foregoing reasons, it cannot be said that the petitioner has violated public order and, accordingly, the petition is required to be allowed.

The petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless the detenu is required in connection with any other case. The Rule is made absolute accordingly.

16th August, 2004 (P.B. Majmudar, J.)

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(apj)